IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVIAGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO "DEFENDANTS TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC. AND COBB-VANTRESS, INC.'S MOTION FOR MORE DEFINITE STATEMENT WITH RESPECT TO COUNTS ONE AND TWO OF THE AMENDED COMPLAINT"

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the

Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits that Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc.'s Motion for a More Definite Statement with Respect to Counts One and Two of the Amended Complaint and Integrated Opening Brief in Support Thereof ("Tyson Defendant Group Motion") is not well-taken and should be denied.[1]

I. Introduction

The State has brought suit for monetary damages, remediation and injunctive relief for the injuries in the Illinois River Watershed ("IRW") it has suffered as a result of the Poultry Integrator Defendants' improper poultry waste disposal practices in Oklahoma and Arkansas. *See generally* First Amended Complaint ("FAC"). These improper poultry waste disposal practices are ones for which the Poultry Integrator Defendants are legally responsible. *See id.* Among the theories of recovery the State has asserted against the Poultry Integrator Defendants are two brought pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* FAC, Count 1, ¶¶ 70-77 & FAC, Count 2, ¶¶ 78-89.

The Tyson Defendant Group Motion asserts that the State's FAC does not provide movants "with sufficient notice as to the geographic area(s) which the State Plaintiffs are contending constitute the 'facilities' or 'Superfund sites' which they claim the Tyson Defendants are, among other things, obligated to clean up or remediate." Tyson Defendant Group Motion, pp. 3-4. This assertion is without foundation. As pertains to the term "facility," the FAC quite plainly and clearly alleges:

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[1] This Memorandum in Opposition is intended to respond not only to the Tyson Defendant Group Motion, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Tyson Defendant Group Motion.

> The IRW, including the lands, waters and sediments therein, constitutes a "site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . . ." and, as such, constitutes a "facility" within the meaning of CERLCA, 42 U.S.C. § 9601(9). Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied, also constitute a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the "releases" and / or "threatened releases" of "hazardous substances" into the IRW, including the lands, waters and sediments therein, resulted.

FAC, ¶¶ 72, 81. It strains credibility for the Tyson Defendant Group to contend that these allegations do not provide it with sufficient notice of the State's allegations with respect to the term "facility."

II. Legal Standard

Fed. R. Civ. P. 12(e), Federal Rules of Civil Procedure, provides in part: ". . . If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading . . . ." It has long been the law, however, that:

> A Motion for More Definite Statement is to be granted only if the pleading is so vague that Defendant cannot be required to frame a responsive pleading. If Plaintiff's claim in the Complaint is sufficiently definite to enable the Defendant to know what is charged, it is sufficiently definite to overcome a Rule 12(e) Motion as the Defendant is reasonably able to respond, knowing whether or not it did the things charged. In general, a Motion for More Definite Statement is not favored, and is rarely granted in view of the availability of the variety of pretrial discovery procedures. The Motion may not be used as a substitute for the discovery and deposition procedures made available by the Federal Rules of Civil Procedure.

Usery v. Teamsters Local 886, 72 F.R.D. 581, 582 (W.D. Okla. 1976) (citations omitted). Similarly, in *Peterson v. Brownlee*, 314 F.Supp.2d 1150, 1155-56 (D. Kan. 2004), the court explained:

> Such motions are disfavored in light of the liberal discovery provided under the federal rules and are granted only when a party is unable to determine the issues requiring a response. A motion for more definite statement should not be granted merely because the pleading lacks detail; rather, the standard to be applied is whether the claims alleged are sufficiently specific to enable a responsive pleading in the form of a denial or admission.

(Citations and quotations omitted.) *See, e.g., Sierra Club v. Young Life Campaign, Inc.*, 176 F.Supp.2d 1070, 1085 (D. Colo. 2001) (denying motion for more definite statement as to standing in Clean Water Act case, stating that movants' demands "can and should be pursued through discovery, not the pleadings").

III. Argument

The Tyson Defendant Group is unable to meet the burden of Fed. R. Civ. P. 12(e) because the allegations of the FAC, particularly when read in the context of statutory language of CERCLA and the caselaw interpreting CERCLA, provide ample definition of the term "facility."[2]

> CERCLA establishes strict liability for the following:
>
> (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a

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[2] At the outset it should be noted that the Tyson Defendant Group has filed answers to the FAC, although within their respective answers they have not responded to the specific allegations pertaining to "facility." The plain language of Fed. R. Civ. P. 12(e) provides that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." (Emphasis added.) Accordingly, the State submits that the Tyson Defendant Groups' motion is untimely.

> threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a). CERCLA defines "facility" as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

It cannot be disputed that the courts give the term "facility" a broad reading. *See Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1174 (10th Cir. 2004) ("Both sides agree that the circuits that have applied the defined term 'facility' have done so with a broad brush"). As explained in *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998), "[t]he words of the statute suggest that the bounds of a facility should be defined by the bounds of the contamination. However, an area that cannot be reasonably or naturally divided into multiple parts or functional units should be defined as a single 'facility,' even if it contains parts that are non-contaminated. Were this not the case, the statute would have defined a facility as 'those parts of a site' with contamination." (Emphasis in original) (citations omitted). Similarly, as explained in *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F.Supp.2d 693, 708-09 (W.D. Ky. 2003), "[c]ourts have consistently interpreted the term 'facility' broadly. . . . [W]hen multiple sources of hazardous substances are grouped together, the facility encompasses the entire area and extends to 'the bounds of the contamination.' . . .'[F]acility' for reporting purposes, cleanup purposes or any other statutory purpose extend under the case law to the bounds of the contamination." *See also Seaboard Farms,* 387 F.3d 1167 (holding that entire farm complex, rather than each individual lagoon, barn and land application area contained within farm complex, constituted a

"facility" for purposes of CERCLA); *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1279-80 (N.D. Okla. 2003), *vacated pursuant to settlement* (noting that "[a]lthough the definition of 'facility' is expansive enough to include the Watershed within its scope, the factual record before the Court on plaintiffs' motion for partial summary judgment is insufficient. The documents which plaintiffs cite in support of their statement of facts regarding the land application of poultry litter, i.e., the alleged 'disposal' of phosphorus, within the Watershed are either unauthenticated documents or responses to interrogatories which at best admit only to the generation of, and not the land application of, poultry litter in the Watershed. Accordingly, the Court cannot make any finding regarding the boundaries of the 'facility' at this juncture").

It is against this backdrop of caselaw that the sufficiency of the State's allegations with respect to the term "facility" must be judged. To begin, the FAC sufficiently alleges facts defining the IRW. *See* FAC, ¶¶ 22-31. Further, the FAC sufficiently alleges facts demonstrating that the Tyson Defendant Group has ample knowledge as to where the growing operations in the IRW for which it bears legal responsibility are located. *See* FAC, ¶¶ 32-45. Yet further, the FAC sufficiently alleges facts demonstrating that the Tyson Defendant Group has ample knowledge as to where the poultry waste (including the hazardous substances contained therein) from these growing operations has been deposited, stored, disposed of, or placed.[3] *See* FAC, ¶¶

[3] The Tyson Group Defendants fault the State for failing "to identify with any specificity the location of any parcel of land on which the State Plaintiffs contend poultry litter containing a hazardous substance has actually been applied." Tyson Group Defendants' Motion, p. 4. Notice pleading, however, does not require that degree of specificity. *See Lone Star Industries, Inc. v. Horman Family Trust*, 960 F.2d 917, 920-22 (10th Cir. 1992) (general notice pleading rules apply in CERCLA cases). In any event, the Tyson Group Defendants ignore that the State has in fact alleged that all poultry waste contains hazardous substances and that the Poultry Integrator Defendants are responsible for the proper storage, handling and disposal of all of their respective poultry waste (and therefore are charged with knowledge of where that has occurred). Additionally, the Poultry Integrator Defendants are responsible not only for where the poultry waste is applied, but also where it has "otherwise come to be located." In light of these

46-64. And, finally, the FAC sufficiently alleges facts demonstrating that the Tyson Defendant Group has ample knowledge as to where the poultry waste (including the hazardous substances contained therein) from these growing operations has ultimately otherwise come to be located. *See* FAC, ¶¶ 52-55 & 59-60. These allegations are plainly not "so vague" that the Tyson Group Defendants cannot determine the meaning of the term "facility" in the FAC and frame a responsive pleading in the form of an admission or denial – particularly in light of the specific allegations below and caselaw dictating that the term be broadly construed.

> The IRW, including the lands, waters and sediments therein, constitutes a "site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . . ." and, as such, constitutes a "facility" within the meaning of CERLCA, 42 U.S.C. § 9601(9). Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied, also constitute a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the "releases" and / or "threatened releases" of "hazardous substances" into the IRW, including the lands, waters and sediments therein, resulted.

FAC, ¶¶ 72, 81. The fact that the Tyson Group Defendants understand the definitions of "facility" being used by the State is, in fact, revealed by the allegations in the FAC, ¶ 66, which state that "in a recent open letter published to the citizens of Oklahoma, certain of the Poultry Integrator Defendants admitted that their poultry waste 'potentially impact[s] the health of the rivers and streams that lie within [Oklahoma's Scenic River Watershed].'" For the Tyson Group Defendants to now feign ignorance and play coy is extremely disingenuous.

This disingenuousness is underscored by the fact that at least three of the Poultry Integrator Defendants answered the specific allegations of the FAC defining "facility." *See* Answer of Separate Defendants George's Inc. and George's Farms, Inc., ¶ 72 ("That George's denies each and every allegation contained in Paragraph 72 of the First Amended Complaint") &

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facts, *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96 (3rd Cir. 1999), is simply irrelevant.

¶ 81 ("That George's denies each and every allegation contained in Paragraph 81 of the First Amended Complaint"); Answer of Simmons Foods, Inc., ¶ 72 ("Denied") & ¶ 81 ("Denied"). Implicit in these answers is that the FAC was not vague and that these Poultry Integrator Defendants were, indeed, reasonably able to respond. *See, e.g., Buxton v. Gardner*, 2 F.R.D. 351, 352 (E.D. Mo. 1942) (denial of Rule 12(e) motion; "Plaintiff urges that the co-defendant herein has already answered without obtaining this information, which evidences, counsel says, the lack of necessity in the movant for these facts. Such fact is not necessarily conclusive, but has some force"). The Tyson Group Defendants are similarly able to fully respond and should be required to do so.

IV. Conclusion

WHEREFORE, premises considered, the Tyson Group Defendants' motion for a more definite statement with respect to the allegations pertaining to the definition of "facility" should be denied.

Respectfully submitted,

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